IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.411 OF 2003

Tony Guinness ... Petitioner

v/s

Ajay Kanoria and others ... Respondents

Mr S. Mehta with Mr A. Patil, Ms C.K. Bhadha and Mr S. Kasliwal i/b M/s Advani and Co. for Petitioner.

Mr Rafiq Dada with Mr Milind Sathe, Mr C.S. Balsara and Mr Anurag Gokhale i/b M/s A.S. Dayal and Co. for Respondents.

CORAM : D.K.DESHMUKH J.

DATE : 24TH MARCH 2005

P.C.: -

1. By this petition, the petitioner challenges the award made by the Sole Arbitrator dated 4th April 2003. There is a preliminary objection raised to the maintainability of the petition. The preliminary objection is that this petition is barred by the law of limitation. In the affidavit in reply filed by the respondents, the respondents have stated in paragraph 2 that the award dated 5th April 2003 was sent by the Indian Council of Arbitration under cover of its letter dated 24th April 2003 by registered airmail to the petitioner. It is further stated that the letter dated 24th April 2003 alongwith its enclosure being the award was also faxed to the petitioner on the fax number on which all earlier faxes were sent and were duly received. The respondents further state in their objection that the respondents requested the Registrar of Indian Council of Arbitration to let the respondents know whether the award has been duly received by the petitioner. On receiving this request from the respondents, the Indian Council of Arbitration made inquiries with the Senior Superintendent of the Post Office. The Department of Post by letter dated 26th June 2003 confirmed that the letter dated 24th April 2003 was despatched to its destination on 30th April

2003. The present petition has been filed on 8th September 2003. According to the petitioner, it has been filed after three months of the service of award on the petitioner. It is not even within the period of 30 days after the expiry of period of three months. According to the respondents therefore, the petition cannot be entertained. In the rejoinder, the petitioner has stated that the petitioner was ill in March 2001. The petitioner states that he received letter dated 24th April 2003, which was sent by fax on 21st August 2003 when he went to the office of the respondent No.4 Company. Except for making a statement that the petitioner received the award for the first time on 20th August 2003, he does not deny that he received the letter and the award which were sent by registered airmail. The next defence that is raised by the petitioner is that the letter dated 24th April 2003 is not addressed to the petitioner in his personal capacity, but is addressed to him as a Director of the respondent No.4 Company.

2. The learned counsel appearing for petitioner submitted that apart from the fact that the letter dated 24th April 2003 which was sent by fax was not received by him till 20th August 2003, even if it is assumed that because the fax was sent at the number which was disclosed by the petitioner himself, service of the copy

of award which was sent by fax will not be the starting point of limitation because under the Act, the petitioner is entitled to receive a signed copy of the award. According to the learned counsel, so far as the letter and the award sent by registered airmail are concerned, even if it is assumed that because of the provisions of General Clauses Act, a presumption arises that the petitioner must have received the award within a reasonable time from the date of its despatch. That presumption is dispelled according to the petitioner when the petitioner denied that he did not receive the award till 20th August 2003. According to the learned counsel appearing for petitioner therefore the petition is within limitation. It was further submitted that the award which is impugned in this petition is a nullity and therefore though the petition under section 34 of the Arbitration and Conciliation Act 1996 is not filed within limitation, it can still be entertained by this Court.

3. Now so far as the provisions of the said Act which are relevant for the present purpose are concerned, sub-section (5) of section 31 of the said Act reads thus :-

> "31(5). After the arbitral award is made, a signed copy shall be delivered to each party."

. Thus, sub-section (5) of section 31 casts duty on the Arbitral Tribunal to deliver a signed copy of the award to the party. The period of limitation for challenging the award is laid down by sub-section (3) of section 34 which reads as under :-

> "34(3). An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal."

. Perusal of the above quoted sub-section (3) of section 34 shows that the period of limitation starts from the date on which the party making the application under section 34 has received the arbitral award. The Act does not provide for the mode by which the award is to be delivered by the Arbitrator to the party. The next provision that is relevant is section 3 of the said Act which reads as under :-

> "3. Receipt of written communications
>
> (1) Unless otherwise agreed by the parties -

(a) any written communication is deemed to have been received if it is delivered to the addressee personally or at his place of business, habitual residence or mailing address, and

(b) if none of the places referred to in clause (a) can be found after making a reasonable inquiry, a written communication is deemed to have been received if it is sent to the addressee's last known place of business, habitual residence or mailing address by registered letter or by any other means which provides a record of the attempt to deliver it.

(2) The communication is deemed to have been received on the day it is so delivered.

(3) The section does not apply to written communications in respect of proceedings of any judicial authority.

. Perusal of the above quoted provision shows that in the absence of any agreement between the parties, a written communication is deemed to have been received if it is delivered to the addressee at his

place of business, habitual residence or mailing address. So far as the petitioner is concerned, he himself has disclosed in paragraph 13 of his rejoinder as under :-

> "13. The letter dated 24.4.2001 was addressed to Respondent No.4 and to me in my capacity of Director and Secretary of Respondent No.4. According to clause 27 of the Business Agreement, 'all notices.... shall be in writing and shall be deemed to have been duly delivered to either party two days after being sent prepaid by receipted courier service, in each case, with a copy by facsimile, directed to a party or its representative at the following address'. The clause also provides that any notice to myself shall be addressed as :
>
> For TG: Mr Tony Guinness
> Tudor Lodge, Fountain Lane,
> Hockley, Essex SS5 4ST
> United Kingdom
>
> Facsimile: + 44 1702 206136."

. Thus, the petitioner had disclosed his address

in the business agreement. This business agreement was part of the record of the arbitration and the registered airmail admittedly was sent to the petitioner on this address which was disclosed by the petitioner himself. Therefore, in view of the provisions of section 27 of the General Clauses Act, a presumption would arise that the registered packet which was despatched by registered post was delivered to the petitioner within a reasonable time. It is no doubt true that in a given case, the presumption that is raised by section 27 may be displaced and the burden of proof may shift to the other side if the person to whom the packet is addressed denies having received the packet. The learned counsel appearing for petitioner relies on statements made in paragraph 11 of his rejoinder to say that he has denied having received the registered packet. Paragraph 11 is with reference to paragraph 2 of the affidavit in reply. Therefore, to understand whether paragraph 11 denies the averments made in paragraph 2 or not, it will be appropriate to refer to the following statements from paragraph 2 of the affidavit in reply :-

> "2. At the outset, I submit that this petition is barred by limitation as prescribed under the Arbitration and Conciliation Act 1996 (hereinafter called 'the Act') and should be dismissed on this ground alone. I say that

the award dated 05.04.2003 (being Exh.A to the petition) (hereinafter called 'the Award') was duly despatched by the Indian Council of Arbitration (hereinafter referred to as the 'ICA") (which is the body under whose rules the arbitration was conducted) under cover of its letter dated 24.04.2003 by Registered Air Mail to the following persons :

(i) Mr Ajay Kanoria (Respondent No.1)

(ii) eSols Worldwide Ltd.(Respondent No.2)

(iii) Mr T.F. Guinness (Petitioner) and

(iv) Corporate partnerships Ltd. (Respondent No.4)

It is pertinent to note that the letter dated 24.04.2003 alongwith its enclosure being the award was also faxed to the Petitioner on the fax number on which all earlier faxes sent to the Petitioner were duly received. Thereafter, the Respondents, through their Advocates letter dated 15.05.2003 requested the Registrar of the ICA to let the Respondents know whether the award had been received by the Petitioner and the Respondent No.4 and if so, the date of receipt of the award. The ICA in turn wrote to the Senior

Superintendent of Post Offices, India, requesting them to confirm the despatch and the receipt of the award by the Petitioner and Respondent No.4. The Department of Posts, India by its letter dated 26.06.2003, confirmed that the letter dated 24.04.2003 was despatched to its destination on 30.04.2003. In the circumstances, I submit that the award is deemed to have been received by the Petitioner."

. In paragraph 11 of the rejoinder, the petitioner thus states :-

"11. With reference to paragraph 2 of the affidavit in reply of Shriprakash Jain, I deny that the petition is barred by limitation. I was not aware of the Award and did not receive the same until I received a letter dated 20.8.2003 from a law firm in London known as Howard Kennedy, which enclosed a copy of the Award (mentioned at paragraph 11xiii of the Petition). Howard Kennedy's letter was addressed to me in my personal capacity and so it was handed over to me. Hereto annexed and marked Exh.A is a copy of the said letter dated 20.8.2003. I also understand that a

letter was sent to Respondent No.4 separately."

. Perusal of paragraph 11 quoted above shows that the petitioner nowhere denies that he received the packet and the award which was sent by registered airmail. For displacing the statutory presumption raised by section 27 of the General Clauses Act a specific denial and a clear statement that the packet sent by registered post is not received would be necessary. Therefore, now there will be a presumption that the petitioner received the award which was sent alongwith the letter dated 24th April 2003. Therefore, it was the duty of the petitioner to disclose to the Court when he filed the petition as to when did he receive the packet. It is pertinent to note that the presumption that would arise would be that the petitioner received the packet within a reasonable time. Because the place is in London, it can be said that it took about a week for the petitioner to receive the same. Therefore, the petitioner would be deemed to have received the packet in first week of May 2003. If that is so, the present petition would be barred by the law of limitation. There is no application filed for condonation of delay. In the petition also, there is no prayer made for condonation of delay.

4. There is one more aspect which according to me has to be considered. A copy of the award was also sent by fax, the number at which the fax was sent was supplied to the Arbitral Tribunal by the petitioner himself. In paragraph 12 of the rejoinder, the petitioner states thus :-

> "12. I say that the letter dated 24.4.2003 from the Indian Council of Arbitration enclosing the Award was not received by me until 21st August 2003. This was when I received the letter from Howard Kennedy, as mentioned above. Receipt of the letter from Howard Kennedy prompted me to go into the office of Respondent No.4 and search for any other correspondence that might shed light on the matter. it was at this point that I found the letter dated 24.4.2001 as well as other letters."

. It is thus clear from what is stated above that before filing this petition, the petitioner had come to know that on the fax number supplied by him letter dated 24th April 2003 alongwith copy of the award was received. Even assuming that it is the case of the petitioner that copy of service of the award does not amount service of the award on the petitioner, still in

my opinion, the petitioner was under an obligation to disclose to the Court in the petition itself that a copy of award was sent to him by fax on 24th April 2003 since this fact was within his personal knowledge and then plead that the petition is within limitation because he has not received a signed copy of the award. The petitioner was not justified in suppressing the fact of having received a copy of the award by fax as the fact was relevant. I also ado not find much substance in the submission of the learned counsel appearing for petitioner that service of the award by fax on the petitioner would not comply with the requirement of sub-section (5) of section 31 of the said Act. As per sub-section (5) of section 31 of the said Act, what is to be delivered to the party is a copy of the award which is signed by the Arbitrator. It is nobody's case that the copy of the award which was faxed to the petitioner did not show that it was signed by the Arbitrator. Therefore, in my opinion, service of the award by fax on the petitioner would comply with the requirement of sub-section (5) of section 31 and therefore, for the purpose of the present petition, the starting point of limitation would be 24th April 2003 itself when the fax was sent and received on the number disclosed by the petitioner himself. The present petition therefore is clearly barred by the law of limitation. Apart from this, I find that the petitioner

has also not been candid with the Court. in my opinion, it is a duty of a litigant to disclose to the Court the facts which are relevant. The petitioner was not filing the petition within a period of three months from the date of the award. The petitioner in paragraph 16 of the petition has stated that :-

> "16. The Petitioner states that although the impugned Award is dated 5.4.2003, the Petitioner became aware of the Award only on 21.8.2003 when the Petitioner received a copy of Execution Application filed in the High Court of Justice, Queens Bench Division, Commercial Court by Respondent Nos.1, 2 and 3. The Petitioner, therefore, has filed the Petition in time and the same is not barred by limitation."

. Thus, the petitioner filed the petition on becoming aware of the award on seeing copy of the execution application. In my opinion, therefore, it was the duty of the petitioner to disclose what he has stated in paragraph 12 of his rejoinder that after becoming aware of the award, he also found that copy of the award was faxed to him on 24th April 2003 itself. A litigant owes a duty to the Court to be candid and truthful to the Court and to disclose to the Court full

facts, especially the facts which are relevant and are within special knowledge of that litigant. I find that the petitioner has failed in his duty to be candid and truthful to the Court.

5. So far as the second submission of the learned counsel for petitioner is concerned, perusal of provisions of sub-section (3) of section 34 of the said Act shows that an application for setting aside an award can be made only within the period specified by sub-section (3) of section 34. The ground on which the award is being challenged is not relevant for the purpose of computing the period of limitation. Once the Court finds that the petition is not filed within the period of limitation provided by sub-section (3) of section 34, the Court will loose jurisdiction to entertain the petition. The Court will not be in a position to ignore the period of limitation merely because according to the petitioner, the award is a nullity or the award is ipso facto void. Thus, I do not find any substance in the contention urged on behalf of the petitioner that because the award is a nullity, this Court can entertain the petition which is filed beyond the period of limitation. Taking overall view of the matter therefore, the petition is liable to be dismissed. It is accordingly dismissed. The petitioner is directed to pay costs of this petition to the

respondents as incurred by the respondents.

. At this stage, a request is made for stay of the execution of this order. The award is for payment of money. Therefore, there is no question of granting any stay. The request is rejected.

. Parties to act on the copy of this order duly authenticated by the Associate / Personal Secretary as true copy.

. Certified copy expedited.